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NO. 83-5051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DOUGLAS WILLIAMS, JR.,

Petitioner,

v

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-5051

DOUGLAS WILLIAMS, JR.,

Petitioner,

v

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules, the State of North Carolina responds to the petition of Douglas Williams, Jr.

CITATION TO OPINION BELOW

Douglas Williams, Jr., was tried, convicted, and received a sentence of death in the Superior Court of Edgecombe County. In an opinion reported in State v Williams, 308 N.C. 47, 301 S.E. 2d 335 (1983), the Supreme Court of North Carolina found no error in the conviction and affirmed the judgment of death.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. WHETHER PETITIONER'S CONFESSION WAS INADMISSIBLE DUE TO THE FACT THAT PRIOR TO MAKING THE CONFESSION HE WAS ADVISED BY THE INVESTIGATING OFFICER THAT A COMPARISON OF HIS TENNIS SHOES WITH SHOE PRINTS FOUND AT THE SCENE OF THE CRIME REVEALED SIMILARITIES?

II. WHETHER THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE TRIAL COURT IN DEFINING "REASONABLE DOUBT" IN ITS INSTRUCTIONS TO THE JURY?

III. WHETHER THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FAILING TO INSTRUCT THE JURY THAT A SENTENCE OF LIFE IMPRISONMENT WOULD BE IMPOSED UPON THE DEFENDANT IN THE EVENT THAT THE JURY WAS UNABLE TO REACH A UNANIMOUS AGREEMENT ON THE PROPER SENTENCE?

STATEMENT OF THE CASE

On August 2, 1981, Douglas W. Williams, Jr., was arrested and charged with the murder of Adah Dawson. On August 17, 1981, Williams was indicted by the Grand Jury of Edgecombe County for the offense of first degree murder of Adah Dawson.

This case was tried at the November 16, 1981, session of the Superior Court of Edgecombe County.

The State presented evidence which, as summarized by the Supreme Court of North Carolina in the opinion below, showed the following:

"Adah Dawson was approximately one hundred years old in August, 1981. She lived in a house on her farm in Edgecombe County. She was visited by Rosella Spencer from approximately 3:30 to 4:00 p.m. on 1 August 1981 and appeared to be all right at that time. At approximately 8:00 p.m. on that date Adah Dawson talked by telephone with Lester Andrews for approximately fifteen minutes at which time she advised him that she was all right.

On the evening of 1 August 1981, Rosella Spencer went to a party at the home of her brother Clifton Edwards. Edwards' house was located in a field approximately one-half mile behind the Dawson home. A path leading to the Edwards home goes directly by the Dawson home. While attending the party in her brother's home, Rosella Spencer observed the Dawson home and noticed that the lights in the kitchen and breakfast room were on at approximately 10:30 p.m. At about the same time, Spencer observed the defendant at the party talking to her sister. She noticed what appeared to be a liquor bottle in the defendant's front pocket but did not see the defendant drinking or know whether he had been drinking. Spencer last noticed the defendant at her brother's home when he went outside sometime between 11:00 p.m. and midnight. Spencer left her brother's home between 1:30 and 2:00 a.m. and noticed that the light in the Dawson kitchen was off at that time while the light in the breakfast room was still on. At approximately 8:00 a.m. on Sunday morning 2 August 1981, Spencer's brother Clifton Edwards saw Adah Dawson's dogs running loose. He went to the Dawson home to put the dogs in their pen. He noticed that

the screen porch door was unlatched and the wooden door to the Dawson home was open. He went inside and saw the body of the victim Adah Dawson lying on the floor in the kitchen. He then ran back to his home and called his sister Rosella Spencer. After receiving a call from her brother at approximately 8:05 a.m., Spencer went to the Dawson home. She went inside and saw the victim lying on her back on the kitchen floor. Spencer observed that the victim's dress was up to her waist and that there were no clothes on the lower half of her body. There were numerous wounds to the victim's face and head.

Members of the Edgecombe County Sheriff's Department arrived at the Dawson home at approximately 8:45 a.m. on 2 August 1981. They asked Rosella Spencer to reenter the Dawson home with them because of her familiarity with the home. After entering the home, Spencer noticed that the weights to a cuckoo clock which hung in a front hall were missing. A drawer in the victim's bedroom was out of the dresser and her pocketbook, papers and other items were lying on the bed and floor. Other drawers were out in another room and screwdrivers and other items were strewn on the floor. A padlock used to keep the door to another room locked had been broken. A flashlight which the victim always kept on the nightstand in her bedroom was on a dresser in the room in which the screwdriver and other items were found on the floor. Spencer also observed that the drapes in the victim's bedroom, which were normally kept open, were closed over the window with a table pushed up to the window. Spencer had never known the victim to close the bedroom curtains in this manner. The curtains in the bathroom

were also pulled together and were held shut by a cup placed in the window. Spencer had never known the victim to close these curtains in this manner.

Deputy Sheriff Jerry Wiggs of the Edgecombe County Sheriff's Department arrived at the Dawson home at approximately 8:45 a.m. on 2 August 1981. As he entered the home, Wiggs saw that the screen door to the porch had been torn away at the bottom. He saw the body of the victim on the floor. He also saw a large puddle of blood on the floor together with a puddle of melted ice cream which was between the victim's legs. The victim's head was against the refrigerator and her dress was pulled up to her waist with a mop lying over her vagina. He also saw a metal object in the shape of a pine cone on the floor near her leg and another near the upper part of her body. These objects were later identified as the weights from the clock in the hallway. Wiggs observed red and brown spots on the refrigerator, red spots on the wall and blood smeared on the floor. The blood was smeared across the floor from the door to the victim's body.

Chief Deputy Sheriff Tom Moore arrived at the Dawson home at approximately 9:45 a.m. When he entered the home, he saw the victim's body on the kitchen floor. His testimony tended to corroborate the testimony of Deputy Wiggs. Deputy Moore also observed blood on the screen door to the kitchen, a pair of glasses on the porch floor just outside the kitchen door, and the telephone off its cradle in the kitchen. He also observed that the handle to the mop located at the lower portion of the victim's body extended between the victim's legs. Deputy Moore observed the general disarray of the house as described by the other witnesses.

Deputy Moore also observed that a person would be required to go through a fenced-in area outside the home in order to enter the porch from the outside of the home. While examining this fenced-in area, he noticed that part of the fence was pushed down at the top. A chair was beneath the pushed down portion of the fence on the side closest to the home. On the other side of the fence from the chair, Deputy Moore found the victim's checkbook and key ring and some paper money and change.

Deputy Moore saw the defendant for the first time on 2 August 1981 while the defendant was sitting outside the Dawson home in Alcoholic Beverage Control Officer James Johnson's car. State Bureau of Investigation Agent Jim Wilson was also present at that time. The defendant was informed on his Miranda rights at that time and made a statement indicating that he had been to a party at one of the houses on the Dawson farm the night before where he had taken pills and consumed a pint of Vodka. The defendant stated he had gone home around 1:30 or 2:00 a.m., returned to the party later and finally returned home at approximately 3:00 a.m. He denied having been to the Dawson home on the night of 1 August 1981. After making this statement to the officers, the defendant went home.

A few hours later, Deputy Moore and Agent Wilson went to the defendant's home and asked for his tennis shoes. The defendant gave them the shoes and gave them permission to take the shoes to the Dawson home to compare them with the shoe prints found there. After making the comparison,

Moore and Wilson returned to the defendant's home and told him that, based upon the results of the comparisons made, they wanted to take him to the Sheriff's Department in Tarboro for questioning. The defendant voluntarily went with them. When they arrived at the Sheriff's Department, the defendant was again given the Miranda warnings. He then agreed to talk with the officers and signed a written waiver of rights form. The officers told the defendant that a comparison had revealed that his tennis shoes made the shoe prints found at the Dawson home. The defendant thereafter made a statement to the officers. He first indicated that he had gone to the Dawson home with someone else but later admitted that he had gone there alone. The defendant stated to the officers that he was 'crazy drunk' from taking 'speed' and drinking Vodka on that night. He stated that he had gone to the Dawson home looking for a place to sleep and had pulled open the screen door leading to the porch off the kitchen. He had not thought that anyone lived in the home and was surprised by the presence of the victim when he went inside. The defendant stated that the victim Adah Dawson threw a handful of salt at him as he was entering the house. He struck her several times with a stick he had picked up onthe porch, and she fell toward him. He laid her on the floor and then went through the house looking for anything he could find. He washed some blood off of his clothing in one of the bathrooms. After going through the house, he went back into the kitchen and forced a mop handle into the victim's vagina. He stated that she then asked him to

'please leave.' He then threw the mop handle down and left. This statement by the defendant was reduced to writing by Agent Wilson and signed by the defendant. The officers questioned the defendant again and recorded the questions and answers. A typed transcript of the recording was made.

A forensic pathologist, Dr. Lewis Levy, performed an autopsy on the body of the victim Adah Dawson. During the course of the autopsy, he found numerous lacerations to the skin of the neck, face, scalp, ear, arms, vagina and rectum together fractures of the face, skull, pubic bones and hip bone. Among numerous other injuries, he observed a laceration at the superior portion of the vagina which entered posterially into the rectum with a communicating tear in that area. Dr. Leby testified that in his opinion the fracture to the public (sic) bones were caused by a large amount of pressure applied to that area. He described the laceration to the victim's vagina as a tear inside her body continuing from her vagina to her rectum. The deepest part of her vagina cavity was torn with the tear extending through and into the rectum. Dr. Levy testified that these injuries were consistent with a stab or jab into the vagina cavity and that it would have taken considerable force to create these injuries. Dr. Levy testified that in his opinion the victim was alive at the time these injuries were inflicted upon her. He did not believe that any of the injuries alone caused her death, but that she died as a result of the multiple injuries including the lacerations and fractures. Dr. Levy additionally testified that several of the lacerations and injuries to the

victim were consistent with her being struck by a blunt force instrument such as a stick, while others were consistent with her being struck by the metal clock weights found near her body.

Several witnesses were accepted by the trial court as experts and testified for the State concerning fingerprint, shoe print and handwriting evidence. Special Agent Stephen Jones, Supervisor of the State Bureau of Investigation Crime Laboratory, testified that comparison tests made between footprint evidence taken from the Dawson home and the shoes the defendant gave the officers showed that some of the footprints were made by the defendant's shoes. This evidence further showed that some of the footprints were probably made by the defendant's shoes and some possibly made by his shoes. Jones further testified that some of the tracks appeared to have been made at the time of the crime and that many of them were bloody. One of the tracks was found on the victim's underpants and another on a dishcloth in the kitchen. Fingerprint comparisons made by Special Agent Jones showed that several fingerprints found on various objects which apparently had been touched by the intruder in the Dawson home were made by the defendant.

Special Agent Dennis J. Mooney, an expert in handwriting analysis, testified that a comparison of the signature on a check found in the victim's checkbook outside the home with handwriting samples taken from the defendant by a court order showed that the signature in the checkbook was made by the defendant. David J. Spittle, a forensic serologist with the State Bureau of Investigation, testified concerning blood found throughout the house including the presence of tennis

shoe prints in several rooms. Agent Spittle further testified that his investigation revealed human blood on the bottom of the defendant's tennis shoes and on one of the laces to the shoes." 301 S.E. 2d pp 339-341.

The defendant offered no evidence at the guilt or innocence phase of the trial.

The jury returned a verdict finding the defendant guilty of murder in the first degree in the perpetration of first degree burglary, in the perpetration of a sex offense, and with malice and premeditation and deliberation.

At the sentencing phase of the trial, the State introduced a written psychological report prepared by Dr. Mary Rood, a forensic psychiatrist at Dorothea Dix Hospital. This report was prepared pursuant to a pretrial psychiatric evaluation of the defendant ordered by the Court. The report stated, in pertinent parts, that the examining psychiatrist found no mental defect or disorder which would have prevented the defendant from distinguishing right from wrong and that even though defendant stated that he was intoxicated, and that intoxication may have impaired his judgment, it would not have relieved him of the responsibility for his actions. The State indicated that it would additionally rely upon other evidence presented at the guilt phase of the trial, and offered no further evidence at the sentencing hearing.

The defendant offered into evidence at the sentencing hearing the "psychiatric testing" portion of Dr. Rood's report showing that the defendant scores in the range of mild mental retardation with an I.Q. of 63, and a reading ability of grade level 3.9. This portion of the report further indicated the possibility of significant organic

brain impairment. The defendant also introduced evidence of his past criminal record which included convictions for larceny, simple assault, assault on a female, damage to real property, using profane language, unauthorized use of a motor vehicle, trespass, and public drunkeness. No further evidence was presented at the sentencing hearing for the defendant.

Based upon the evidence introduced during the sentencing phase of the trial, the trial court presented four possible aggravating circumstances and five possible mitigating circumstances for the jury's consideration.

The jury unanimously found beyond a reasonable doubt four statutory aggravating circumstances and one mitigating circumstance. The jury further found that the aggravating circumstance outweighed the mitigating circumstance, and that the aggravating circumstances found were sufficiently substantial to warrant the imposition of the death penalty. Based upon their answers to these issues, the jury returned a sentence recommendation of death. The trial court then sentenced Williams to death for the crime of first degree murder. (R p 44)

The defendant gave notice of appeal from the conviction and sentence imposed. On April 5, 1983, the Supreme Court found no error in either phase of trial and affirmed the conviction and the sentence.

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S CONFESSION WAS NOT INADMISSIBLE DUE TO THE FACT THAT PRIOR TO THE CONFESSION HE WAS ADVISED BY THE INVESTIGATING OFFICERS THAT A COMPARISON OF HIS SHOES WITH SHOE PRINTS FOUND AT THE SCENE OF THE CRIME REVEALED SIMILARITIES.

Prior to trial, the Petitioner filed a Motion to Suppress extra judicial statements made by him. In that Motion petitioner specifically contended that his oral statements admitting guilt and any paper writings signed by him to that effect were solely the result of promises made to him by the investigating officers that he would receive a shorter sentence in exchange for his submission of guilt (R p 4).[1] In support of this motion petitioner filed an affidavit in which he swore:

> "[Y]our affiant was promised that if he would make a statement admitting his guilt that they, the above named officers, would see that he received a sentence of from 20 years to 30 years. That your affiant in reliance of this promise, made a confession in which he admitted his guilt to the crimes under investigation. (R p 5)

Petitioner did not pursue a hearing on his Motion to Dismiss prior to trial; however, at trial petitioner's counsel entered a general objection to testimony concerning the confession made by the petitioner. The trial court excused the jury and conducted an extensive voir dire examination concerning the voluntariness of petitioner's confession at which time evidence was presented by both the State and petitioner (T pp 75-117).[2] In addition to the previously

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[1] [R p indicates page numbers of the Record on Appeal.]

[2] [T p indicates page numbers of the Transcript where the testimony can be located.]

described affidavit, petitioner offered evidence through his own testimony. As stated by the North Carolina Supreme Court in its opinion, while petitioner's testimony consumes several pages of the transcript, it is adequately summarized by the following:

"Q. Why did you make the statement?

A. Because they promised me 20 to 30 years.

Q. Is that the only reason you made the statement?

A. Yes, Sir." 301 S.E. 2d at 343 (T p 105).

The State offered evidence contrary to defendant's testimony and affidavit.

Upon conclusion of the voir dire, the trial court made extensive findings of fact and conclusions of law based upon the evidence presented. The trial Court found that no threats or promises were made to induce petitioner's confession, and that petitioner was fully informed of his rights and was fully aware of those rights when he knowingly, freely, and voluntarily waived his right to remain silent and to have counsel present (T pp 118-119). Based upon its findings, the trial court concluded that petitioner fully understood all of his rights and "knowingly, freely, and voluntarily, and intelligently waived those rights," and that petitioner's confession was voluntary and admissible (T pp 119-120).

Petitioner conceded on appeal to the North Carolina Supreme Court, as well as in his Petition filed with this Court, that the trial court's findings of fact that he was adequately advised of his rights, that he understood those rights, and that no threats or promises were made to induce

his confession, are supported by substantial evidence. 301 S.E. 2d at 344. However, petitioner raised for the first time on his appeal to the North Carolina Supreme Court an additional challenge to the admissibility of his confession; i.e., that the confession was involuntary in that it was made as a result of his being confronted with incompetent evidence regarding the similarities between his shoes and the shoe prints found at the scene. Petitioner argued that *if* the evidence of the shoe print comparison with which he was confronted was incompetent, any confession induced thereby would be inadmissible. Petitioner reasserts this argument hereunder.

Under North Carolina Rules of Procedure, while a general objection may be sufficient to challenge the voluntariness of a confession and require a *voir dire* hearing when the objection clearly calls the matter to the trial judge's attention, when a confession is challenged on other grounds which are not clearly brought to the attention of the trial judge, a specific objection or explanation pointing to the reason for the objection or motion to suppress is necessary. A constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered upon appeal to the State appellate courts. *State v Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982); *State v Oxendine*, 305 N.C. 126, 286 S.E. 2d 546 (1982). Having failed to pursue in the trial court his motion to suppress the confession upon the grounds now asserted, and having testified and submitted a sworn affidavit that his statements were made solely for the reason that he was

promised a sentence of no more than 20 to 30 years imprisonment if he confessed, petitioner should not be allowed to assert before this court this belated issue. See Moore v Illinois, 408 U.S. 786, reh. den. 409 U.S. 879 (1972).

Defendant's argument arises from his post trial assertion that the investigating officers presented him with false or incompetent evidence concerning similarities shown by a comparison of his shoes with shoe prints at the scene of the crime. If petitioner had been presented with false or incompetent evidence during his in-custody interrogation, such actions would not be condoned by the court, but standing alone, are not necessarily sufficient to render defendant's confession inadmissible. Fraizer v Cupp, 394 U.S. 731, (1969); Moore v Hopper, 389 F. Supp. 931 (M.D. GA 1974), aff'd., 523 F. 2d 1053 (5th Cir. 1975); Roe v People of State of New York, 363 F. Supp. 788 (W.D. NY 1973), aff'd., 495 F. 2d 764 (2nd Cir. 1974); Sovalik v State, 612 P. 2d 1003 (Alaska 1980); Moore v State, 230 GA 839, 199 S.E. 2d 243 (1973); Jacobs v State,133 GA App., 812, 212 S.E. 2d 468 (1974). See generally 99 ALR 2d 772 (1965); 23 CGS Criminal Law §827 (1961). The general rule in the United States is that while deceptive methods of false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession. Fraizer v Cupp, supra; State v Rook,

304 N.C. 201, 283 S.E. 2d 732 (1981), cert. denied, 455 U.S. 1038 (1982). False statements by officers concerning evidence, as contrasted with threats or promises, have been tolerated in confession cases generally, because such statements do not effect the reliability of the confession. Confessions, 79 Harv. L. Rev. 935 (1066); Hopt v Utah, 110 U.S. 574, (1884); Moore v Hopper, supra, 389 F. Supp. 931 (M.D. GA 1974), aff'd., 523 F. 2d 1053 (5th Cir. 1975); Roe v People of the State of New York, supra. Deception or trickery is merely one of the circumstances that the court may consider in looking at the totality of the circumstances surrounding the confession.

In the instant case, petitioner was not confronted with false or incompetent evidence prior to his making his confessions. As found by the North Carolina Supreme Court, SBI Agent Jones, who interrogated petitioner, was accepted as an expert witness and testified extensively concerning the unique characteristics of the tread on the shoes taken from the defendant and the shoe prints found at the scene of the crime. He further testified concerning his comparison of the shoes with the shoe prints and the basis for his conclusion that some of the shoe prints at the scene were definitely made by defendant's shoes. Such testimony, therefore, was clearly competent. 301 S.E. 2d at 344. This conclusion is not here challenged by petitioner. Further, Agent Jones was aware of the similarities prior to his statement to petitioner. Petitioner, therefore, was not confronted with incompetent evidence.

Moreover, the other circumstances do not support a conclusion that the confession was involuntary. Petitioner had been advised of the similarities of the shoe print comparisons prior to the interrogating officers requesting that he voluntarily accompany them for interrogation. Therefore, prior to any in-custodial interrogation, petitioner was aware of the similarities. Moreover, petitioner was not deceived or tricked about the nature of the crime involved or the possible punishment. Carter v Garrison, 656 F. 2d 68 (4th Cir. 1981), cert. den. 455 U.S. 952 (1982); His Miranda rights were not violated. He was not held incommunicado. Davis v North Carolina, 384 U.S. 737, 16 L. Ed. 2d 895 (1966). He was not subjected to prolonged uninterrupted interrogation. State v Morgan, 299 N.C. 191, 261 S.E. 2d 827, cert. den. 446 U.S. 986 (1980). He was not subjected to physical threats or shows of violence. Brown v Mississippi, 297 U.S. 278, 80 L. Ed. 682 (1936). No promises were made to him in return for his confession. He was experienced in the criminal justice system and was not retarded, feeble minded, or emotionally upset. Schneckloth v Bustamonte, 412 U.S. 218, (1973). Petitioner's independent will was not overcome, so as to induce a confession he was not otherwise disposed to make, by mental or psychological coercion or pressure. State v Morgan, 299 N.C. 191, 261 S.E. 2d 827, cert. den. 446 U.S. 986 (1980). Finally, petitioner's own testimony and sworn affidavit that the only reason he made the statement was because he had been promised 20 to 30 years imprisonment belie his new contention that his confession was improperly induced as a result of being informed prior to interrogation, as well as during interrogation, of the similarity of the

shoe print comparisons.

Both the North Carolina Rule and the Federal Rule for determining the admissibility of a confession are the same. It is a rule or test of voluntariness in which the court looks at the totality of the circumstances of the case in determining whether the confession was voluntary. Schneckloth v Bustamonte, supra; Fraizer v Cupp, supra; State v Schneider, 306 N.C. 351, 293 S.E. 2d 157 (1982); State v Booker, supra; State v Davis, supra. When the totality of the circumstances of this case are viewed, it is evident that no due process or Fifth Amendment rights, State or federal, of the petitioner were violated, and that petitioner's confession was freely, intelligently, and voluntarily made. This court, therefore, ought not grant its writ to review this issue.

II. THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS NOT VIOLATED BY THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DEFINING "REASONABLE DOUBT."

Petitioner contends that the trial court erred in its instruction to the jury by incorrectly defining the term "reasonable doubt." Petitioner argues that the trial court erred in instructing the jury that a reasonable doubt can only be "generated by the insufficiency of the proof," thereby precluding the jury from finding a reasonable doubt based upon the evidence. This contention is without merit.

The term "reasonable doubt" has often been defined as a doubt "based on reason which arises from the evidence or lack of evidence." Johnson v Louisana, 406 U.S. 356, 360 (1972); State v Hammonds, 241 N.C. 226, 85 S.E. 2d 133 (1954). In North Carolina, it has been held error for the trial court to instruct the jury that a reasonable doubt may only be based upon the evidence presented, and fail to inform them that it may also arise from the lack of evidence. State v Hammonds, supra, 241 N.C. 226, 85 S.E. 2d 133 (1954); State v Braxton, 230 N.C. 312, 52 S.E. 2d 895 (1949); State v Tyndall, 230 N.C. 174, 54 S.E. 2d 272 (1949). Conversely, petitioner argues that it was error for the trial court to instruct the jury that a reasonable doubt may only be based upon the insufficiency of the proof, without further instructing that reasonable doubt may also arise out of the evidence.

It is well established that the trial court's instructions must be construed contextually and in their entirety. State v Swift, 290 N.C. 383, 226 S.E. 2d 652 (1976). A challenged instruction must be viewed as part of and in context with the whole record. United States v Park, 421 U.S. 658, 674-675 (1974).

In the instant case, the trial court instructed the jury, in pertinent part, as follows:

> "The burden of proof is upon the state to satisfy the jury from the evidence in the case and beyond a reasonable doubt of his guilt.
>
> Now, a reasonable doubt is not a vain, imaginary or fanciful doubt but it is a sane, rational doubt. When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it

> is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge. If after considering, comparing and weighing all of the evidence the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt. Otherwise, they do not.
>
> A reasonable doubt as that term is employed in the administration of criminal law is an honest, substantial misgiving, generated by the insufficiency of the proof; an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused.
>
> It is not a doubt suggested by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony. Nor is it one born of a merciful inclination or disposition to permit the defendant to escape the penalty of the law, nor one prompted by sympathy for him or those connected with him." (Emphasis added.)

When the portion of the trial court's instructions defining reasonable doubt in the instant case are viewed contextually and as part of the whole record, it is apparent that the court's instructions on reasonable doubt carry the very meaning that petitioner contends were omitted. In the sentence immediately preceding the trial court's definition of the term "reasonable doubt," the trial court instructed the jury that "the burden of proof is upon the State to satisfy the jury from the evidence in the case and beyond a reasonable doubt of his guilt." (Emphasis added.) Additionally, the court referred to the jury's responsibility to consider matters arising from the evidence at several other points in the instructions when speaking to the State's burden of proof and reasonable doubt. As found by the North Carolina Supreme Court upon review of this question below, "[w]hen the instructions are read contextually and in their entirety, it is

apparent that, when the trial court used the phrase 'insufficiency of the proof' in its instructions on reasonable doubt, it was referring to insufficiency of proof arising from the evidence as well as insufficiency of proof arising from the lack of evidence. See State v Swift, 290 N.C. 383, 226 S.E. 2d 652 (1976)." 301 S.E. 2d at 346. The trial court's instructions therefore did not preclude the jury from finding a reasonable doubt based upon the evidence as alleged by petitioner. Further, the court's instructions on reasonable doubt were in conformance with other instructions previously approved by the North Carolina Supreme Court. See State v Schoolfield, 184 N.C. 721, 114 S.E. 2d 466 (1922); State v Steele, 190 N.C. 506, 130 S.E. 308 (1925); State v Hammonds, supra. The instructions of the trial court on reasonable doubt therefore were not in error, nor were they violative of petitioner's right to due process of law. For this reason, this Court should not grant petitioner the writ he seeks.

III. THE TRIAL COURT DID NOT VIOLATE THE EIGHTH AMENDMENT BY FAILING TO INSTRUCT THE JURY THAT A SENTENCE OF LIFE IMPRISONMENT WOULD BE IMPOSED UPON THE DEFENDANT IN THE EVENT THAT THE JURY WAS UNABLE TO REACH A UNANIMOUS AGREEMENT ON THE PROPER SENTENCE.

At the conclusion of the trial court's charge to the jury at the sentencing phase of the trial, petitioner requested an instruction to the effect that if the jury could not agree on the sentence within a reasonable time, it would be discharged and a sentence of life imprisonment imposed. The trial court refused to so instruct.

Generally, under North Carolina law when a party tenders a timely request for a specific instruction which is correct in itself and is supported by applicable evidence and law, the trial court's failure to give the instruction, in substance at least, is error. 4 Strong's N.C. Index 3d, Criminal Law, §119, pp 633-635. Petitioner argues that since N.C.G.S. 15A-2000(b) provides that the trial court in a capital case shall impose a sentence of life imprisonment where the jury is unable to agree to a sentence recommendation within a reasonable time, he was entitled to such an instruction upon request. Petitioner contends that the refusal of the trial court to grant his request for this special instruction violated his rights guaranteed by the Eighth Amendment. This contention is without merit.

N.C.G.S. 15A-2000(b), reads:

> "Sentence Recommendation by the Jury.-- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections(e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.
>
> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
> (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.
>
> The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.
>
> If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation."

N.C.G.S. 15A-2000(c), reads:

> "Findings in Support of Sentence of Death.--When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:
>
> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
>
> (2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
>
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found."

In determining this issue, one must not merely look at that portion of N.C.G.S. 15A-2000(b) set forth in petitioner's petition, but must take in consideration the entire provisions of both G.S. 15A-2000(b) and (c). Further, one must look to the Supreme Court of North Carolina's interpretation of these statutory provisions to see whether any substantial rights of petitioner were violated.

The Supreme Court of North Carolina in State v Pinch, 306 N.C. 1, 292 S.E. 2d 203 (1982); State v Smith, 305 N.C. 691, 292 S.E. 2d 264 (1982); and State v Williams, 305 N.C. 656, 292 S.E. 2d 243 (1982), construed the language of N.C.G.S. 15A-2000(b) and (c) to require the trial court to charge the sentencing jury in a first degree murder case that if a jury finds beyond a reasonable doubt that (1) one or more aggravating circumstances existed, (2) that these aggravating circumstances were substantial enough to warrant the death penalty and (3) that the aggravating circumstances outweighed the mitigating circumstances, then the jury shall recommend a sentence of death. The Court is

to further charge the jury that if it does not find any one of those things, it has a duty to recommend a sentence of life imprisonment. State v Pinch, supra.

In State v Pinch, supra, the Supreme Court of North Carolina held that the jury could not be allowed to exercise unbridled discretion and disregard its findings made pursuant to N.C.G.S. 15A-2000(c). "The jury may not arbitrarily or capriciously impose or reject a sentence of death. Instead, the jury may only exercise guided discretion in making the underlying findings required for recommendation of the death penalty within the 'carefully defined set of statutory criteria...' (Citations omitted)." State v Pinch, supra, 301 N.C. at 33, 292 S.E. 2d at 227. Therefore, if the jury were to find one or more aggravating circumstances existed, that these aggravating circumstances were substantial enough to warrant the death penalty, and that the aggravating circumstances outweighed the mitigating circumstances, it may not ignore these findings and return a recommendation of a sentence of life imprisonment, but must recommend a sentence of death. Such a procedure was found constitutionally valid by this Court in Jurek v Texas, 428 U.S., 262 (1976).

In State v Goodman, 298 N.C. 1, 35, 257 S.E. 2d 569, 590, (1979), the Supreme Court of North Carolina, in holding that a jury may not recommend a sentence of life imprisonment where they find the aggravating circumstances outweighed those in mitigation, stated:

> "[I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would

> be to revert to a system prevaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it."

Under the Supreme Court of North Carolina's interpretation of N.C.G.S. 15A-2000(b) and (c) the jury may not ignore its findings under N.C.G.S. 15A-2000(c) and arbitrarily impose a sentence of life imprisonment. Clearly, that portion of N.C.G.S. 15A-2000(b) cited by petitioner providing that if the jury in a capital case cannot, within a reasonable time, unanimously agree to a sentence recommendation, the judge shall impose a sentence of life imprisonment, is purely procedural rather than substantive in nature. State v Goodman, supra. Therefore, while the requested instruction is a correct statement of the law, it concerns a procedural matter, and was not one that should have been the subject of an instruction. State v Goodman, supra. Failure to give the requested instruction does no more than to prevent the court from informing the jury of the effect of its disagreement on which sentence should be imposed. The long standing rule in North Carolina has been that the after-effect of a jury's deliberation is not a proper consideration for the jury. See State v Smith, supra. To require the trial court to give the requested instruction therefor would be to require the court to instruct the jury on procedural matters for which the jury may make no determination. State v Goodman, supra. Moreover, to give the requested instruction would be to revert to a system prevaded by arbitrariness and capriciousness. State v Goodman, supra. It would allow the jury to ignore

the procedure outlined in N.C.G.S. 15A-2000(b) and (c) and to improperly exercise unbridled discretion to recommend a sentence of life or death regardless of its mandatory findings under N.C.G.S. 15A-2000(c). State v Pinch, supra. The exercise of such unbridled discretion by the jury under the requested instruction would be contrary to the rules enumerated by this Court in Furman v Georgia, 408 U.S. 238 (1971), and the cases which have followed. State v Goodman, supra; State v Pinch, supra.

In addition, the giving of the requested instruction would have been an open invitation for the jury to avoid its responsibility to recommend the sentence to be imposed by the expedient of failing to reach a unanimous verdict.

In State v Hutchins, 303 N.C. 321, 353, 279 S.E. 2d 788, 807 (1981), the Supreme Court of North Carolina stated with regard to this issue, as follows:

> "Lastly, defendant challenges the failure of the trial court to instruct the jury that a sentence of life imprisonment would be imposed in the event that it failed to reach unanimous agreement on the proper sentence. There was no error. We have previously held that such an instruction is improper because not only would it be of no assistance to the jury, it would also permit the jury to escape its responsibility to recommend the sentence to be imposed. STATE v JOHNSON, 298 N.C. 355, 259 S.E. 2d 752 (1979)."

In State v Smith, supra, the North Carolina Supreme Court further stated:

> "Our court has previously decided that it is improper for the jury to consider what may or may not happen in the event it cannot reach a unanimous sentencing verdict (citation omitted). We shall take this opportunity, however, to state our agreement with the observations made by the Virginia Supreme Court ... that such an instruction would be tantamount to 'an open invitation for the jury to avoid its responsibility and to disagree.' JUSTUS v COMMONWEALTH, 220 Va. 971, 979, 266 S.E. 2d 87, 92 (1980), cert. den., 455 U.S. 983 (1982). Accord, HOUSTON v STATE, 593 S.W. 2d 267, 278 (Tenn. 1980), cert. denied, 449 U.S. 891 (1980)." 305 N.C. at 710, 292 S.E. 2d at 276.

While the general rule in North Carolina is that where a prayer for special instruction is aptly tendered, and the instructions requested are correct in law and are based upon the evidence adduced, it is error for the court to fail to give the instruction requested, in substance at least, it is further the rule that the trial court is not required to give the requested instructions where they are not germane to the issue to be determined by the jury or relate merely to procedural matters over which the jury may make no determination. 4 Strong's N.C. Index 3d, Criminal Law, §§119-120, pp 633-636. See also, State v Goodman, supra; State v Pinch, supra.

In State v Williams, supra, the Supreme Court of North Carolina rejected the argument that the jury despite its findings made pursuant to N.C.G.S. 15A-2000(c) ought still be able to return a life sentence if it desired. The Court stated:

> "The defendant argues that even if the jury fails to find sufficient mitigating circumstance(s) which outweigh the aggravating circumstances found, it may still, in its discretion, impose a sentence of life imprisonment. We find no authority for that position in G.S. 15A-2000(e) or elsewhere....G.S. 15A-2000(b) requires the jury to deliberate and render a sentence recommendation 'based upon' two considerations: (1) whether sufficient aggravating circumstances exist and (2) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found. The statute specifically requires that the jury sentence recommendation be 'based on these considerations' - not unbridled discretion. G.S. 15A-2000(b)(3). This specific mandate is clear - it requires no interpretation." 292 S.E. 2d at 263 (emphasis added).

The provisions of N.C.G.S. 15A-2000(b) and (c) were construed by the Supreme Court of North Carolina as a matter of State law. Further, in construing the issue presented in the instant case, the Supreme Court has determined as a matter of State law that not only do the provisions of N.C.G.S. 15A-2000(b) cited by petitioner not entitle a defendant to an instruction as requested by petitioner in the instant case, but that such an instruction under State law would be improper. State v Brown, 306 N.C. 351, 293 S.E. 2d 264 (1982); State v Smith, supra; State v Hutchins, supra. Petitioner's argument therefore that he was entitled to the requested instruction pursuant to N.C.G.S. 15A-2000(b) is without bases.

This Court must defer to the interpretation placed on a State statute by this highest State court, where, as here, the interpretation is made solely as a matter of local law: Jankovich v Indiana Toll Road Commission, 379 U.S. 487 (1965);

Scripto v Carson, 362 U.S. 207 (1960); cf. Hankerson v North Carolina, 432 U.S. 233, 244-245 (1977). The North Carolina Supreme Court's interpretation of the statute is not repugnant to Federal Constitutional mandates. See Jurek v Texas, supra. Petitioner has not cited, and the State is unaware of any, authority mandating that under the Eighth Amendment a defendant in a capital case wherein similar sentencing procedures to N.C.G.S. 15A-2000(b) and (c) are followed, is entitled to an instruction that if the jury cannot agree on a sentence recommendation within a reasonable time, the trial judge shall impose a sentence of life imprisonment. In fact, this same argument was rejected by the highest State courts in both Virginia and Tennessee, which have similar statutory provisions. See, Justus v Commonwealth, 220 Va. 971, 266 S.E. 2d 87 (1980), cert. denied, 455 U.S. 983 (1982); Houston v State, 93 S.W. 2d 267 (Tenn. 1980), cert. denied, 449 U.S. 891 (1980). Moreover, petitioner was not denied a right or privilege extended to other persons under State law. No defendant in a capital case in North Carolina is entitled to this requested instruction. Neither was petitioner denied due process. Therefore, this court ought not issue its writ of certiorari to the Supreme Court of North Carolina since there is no federal question here presented for review.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that Douglas Williams, Jr.'s petition for writ of certiorari should be denied.

This the 4th day of August, 1983.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Ralf F. Haskell, Assistant Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the Attorney of Record for Petitioner Douglas Williams, Jr., by depositing same in the United States mail, first class postage prepaid, and properly addressed as follows:

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This the 4th day of August, 1983.

Ralf F. Haskell
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